IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

COMPANY PETITION No 225 of 1997

WITH

COMPANY PETITION No 101 of 1998
COMPANY PETITION No 50 of 1999
COMPANY PETITION No 51 of 1999
COMPANY PETITION No 52 of 1999
COMPANY PETITION No 53 of 1999
COMPANY PETITION No 54 of 1999
COMPANY PETITION No 55 of 1999
COMPANY PETITION No 56 of 1999
COMPANY PETITION No 57 of 1999
COMPANY PETITION No 58 of 1999
COMPANY PETITION No 49 of 1999
COMPANY PETITION No 77 of 1999
COMPANY PETITION No 409 of 1997
COMPANY PETITION No 410 of 1997
COMPANY PETITION No 44 of 1999
COMPANY PETITION No 387 of 1997
COMPANY PETITION No 341 of 1997
COMPANY PETITION No 290 of 1996
COMPANY PETITION No 256 of 1997
COMPANY PETITION No 395 of 1997
COMPANY PETITION No 90 of 1998
COMPANY PETITION No 129 of 1998
COMPANY APPLICATION No 525 of 1997
IN
COMPANY PETITION No 387 of 1997

For Approval and Signature:

HON'BLE MR.JUSTICE K.A.PUJ

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : YES

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

CENTRUM FINANCE LIMITED

Versus

PHAR-EAST LABORATORIES LTD.

Appearance:

1. COMPANY PETITION Nos. 225 of 1997 & 129 of 1998
   MR PC KAVINA for Petitioner No. 1
   MR RD DAVE for Respondent No. 1

2. COMPANY PETITION Nos. 50 to 58, 49, 77, 44 of 1999 and
   COMPANY PETITION Nos. 409 and 410 of 1997.
   MR AC GANDHI for Petitioners.
   MR RD DAVE for Respondent No.1.

3. COMPANY PETITION No. 387 of 1997
   COMPANY APPLICATION No 525 of 1997
   MR DHARMESH V SHAH for Petitioner No. 1
   MR RD DAVE for Respondent No. 1

4. COMPANY PETITION No. 341 of 1997
   MR RS SANJANWALA for Petitioner No. 1
   MR RD DAVE for Respondent No. 1

5. COMPANY PETITION No. 290 of 1996
   MR ASHWIN L SHAH for Petitioner No. 1
   MR RD DAVE for Respondent No. 1

6. COMPANY PETITION No. 256 of 1997
   NANAVATI & NANAVATI for Petitioner No. 1
   MR RD DAVE for Respondent No. 1

7. COMPANY PETITION No. 395 of 1997
   MS P J DAVAWALA for Petitioner No. 1
   MR RD DAVE for Respondent No. 1

8. COMPANY PETITION No. 90 of 1998
   MR K M PARIKH for Petitioner No. 1

MR RD DAVE for Respondent No. 1

CORAM : HON'BLE MR.JUSTICE K.A.PUJ

Date of decision: 15/04/2005

COMMON ORAL JUDGEMENT

All these petitions are filed against the respondent Company, namely, Phar-East Laboratories Limited under Section 433 and 434 of the Companies Act, 1956 for winding up of the respondent Company.

2. This Court has passed an order on 20.02.1997 in Company Petition No. 201 of 1996 admitting the said petition. Thereafter, the order of admission was recalled on 12.03.1997 giving certain directions to the respondent Company to make the payment to the petitioner. However, as per the direction the respondent Company has not made the payment to the petitioner and hence, on 21.10.1997, again the order of admission of the petition was passed and the Court has also passed the order with regard to public advertisement in "Indian Express" English Daily and "Financial Express" - Gujarati Daily. The said order was challenged in O.J. Appeal No. 57 of 1997 by the respondent Company and the Division Bench vide its order dated 05.02.1998 stayed the order of advertisement on condition that the respondent Company shall make payment to the petitioning Creditor of Rs. 20 Lacs in the first instance in 4 equal monthly installments of Rs. 5 Lacs each, the first of such installments becoming due on 5th March, 1998, followed by successive installments on 5th of every succeeding calendar month. The petitioning Creditor was also given liberty to accept the said amount subject to its rights and contentions. The Court has also made it very clear that in case of default of any instalment on the due date, the respondent Company would not be entitled to claim any extension in respect thereof. It was also observed that in case of any such default in respect of any of the installments provided in the said order, the stay granted by the Court against the advertisement of the petition would stand vacated ipso facto without further orders in this regard and the appeal which was filed by the respondent Company would also stand dismissed without any further order. The Court has also made it very clear that only the order as to the advertisement of the petition was stayed subject to the aforesaid conditions and there was no stay against the further proceedings and/or ancillary proceedings before

the learned Company Judge.

3. This Court has thereafter passed an order on 26.03.1998 in Company Petition No. 201 of 1996 with Company Application No. 97 of 1998 with Company Petition Nos. 395, 256, 225 of 1997 and 387 of 1998 whereby the Court has given the last opportunity to the respondent Company. The matter has come up for hearing again on 21.04.1998 and a detailed order was passed by this Court. The Court was constrained to observe that there was a glaring failure on the part of the respondent Company to honour the commitments made from time to time and, therefore, all other petitions were also admitted on that day. The Court has also passed further order of advertisement and directed that necessary advertisements would be given as directed earlier and advertisement in the Official Gazette was dispensed with. The Court has also permitted the petitioner in Company Petition No. 225 of 1997 to give advertisement in the Newspapers published from Mumbai. The Court has further observed that in as much as large amounts were due to number of Creditors and commitments made from time to time were not honoured, the respondent Company was restrained from creating any further encumbrance from its assets and creating any third party charges or rights or disposing off its property any further without permission of the Court. The prayer for appointment of the Provisional Liquidator was, however, deferred and the respondent Company was directed to file its reply on the next date of hearing.

4. The Court thereafter passed an order on 09.02.1999 recording the submission of Mr. B.R. Gupta, learned advocate appearing for the petitioner in Company Petition No. 201 of 1996 at the relevant time that the respondent Company has not honoured any of its commitment made from time to time and it was high time that it should be wound up. All necessary formalities have been completed. However, the Court has also considered the request made by Mr. R.D. Dave, learned advocate appearing for the respondent Company and observed that the Company has received a good proposal from Bank of India and on the strength thereof, the respondent Company was trying to revive. The respondent Company was trying to settle with one Select Financial Services Ltd. which was objected to by the other Petitioning Creditors. The Court has, therefore, observed that the respondent Company should come with clean hands with all facts as to how finance was being arranged and as to how they intended to pay the Secured Creditors as well as the Unsecured Creditors in a uniform manner. The Court has

also directed to ask the Managing Director of the respondent Company to personally remain present.

5. The Court has passed an order on 27.11.2000 whereby affidavit filed on behalf of the respondent Company was taken on record and in the said affidavit, it was stated that the Govt. of Gujarat has taken a policy decision for revival of sick companies which are Non BIFR companies. The respondent Company was also a Non BIFR Company and under the said policy, the respondent Company has made an application in the prescribed form to Gujarat Board of Industrial and Financial Reconstruction (GBIFR) which consists of Industries Secretary and Managing Directors of many other financial institutions including GSFC, GIIC, Bank etc. comprising of in all about 22 members. Since the respondent Company has applied on 23.10.2000 and the matter was being considered for rehabilitation / reconstruction, the matter was adjourned. The Court has directed the respondent Company to inform the Court about the payments to be made to each of the Unsecured Creditors within a particular time limit and in the event of acceptance of the scheme submitted by the respondent Company to GBIFR.

6. Since nobody appeared on behalf of the petitioning Creditor in Company Petition No. 201 of 1996, the said petition was dismissed for default on 04.09.2002. No application for restoration was moved. However, certain orders were passed by this Court earlier in Company Petition No. 201 of 1996 and many other petitions are pending against the same respondent Company, the Court has directed the office to place the papers of Company Petition No. 201 of 1996 along with this group of petitions.

7. Many of the above petitions were, thereafter, placed for hearing on 20.11.2002 and the Court was constrained to pass an order on that day that if nobody appeared on behalf of the respondent Company on the next date of hearing, necessary orders would be passed in all these matters. On 12.12.2003, the Court has recorded that the respondent Company wanted to give some proposals towards the outstanding dues of the petitioning Creditors and the matter was, therefore, adjourned to 16.01.2004. All these matters were thereafter adjourned from time to time only with a view to give proposals by the respondent Company. However on 17.06.2004, learned advocate Mr. R.D. Dave has submitted before the Court that the respondent Company had been declared as Relief Undertaking under the Bombay Relief Undertakings (Special) Provision Act, 1958 vide Notification dated

06.11.2003. The period of relief undertaking was commenced from 06.11.2003 and ended on 05.11.2004. By virtue of the said notification, any remedy for the enforcement of any rights, privileges, obligations, liabilities and remedy for enforcement thereof were suspended and proceedings relating thereto pending before any Court, Tribunal, Officer or authority were stayed during this period. The Court has, therefore, directed the office to place all these matters after November, 2004. The Court has also taken on record the said Notification issued by the Government of Gujarat.

8. The period of relief undertaking was over on 05.11.2004 and communication granting further extension to the status of relief undertaking was not placed on record and hence, the matters were placed for further hearing in January, 2005 and matters were adjourned from time to time. On 10.03.2005, the learned advocates of the petitioning Creditors have pressed for winding up order. Learned advocate Mr. R.D. Dave has given a proposal and after hearing the parties on the said proposal, the Court has passed an order on 10.03.2005 wherein it is observed that this group of more than 20 petitions are filed by the petitioning Creditors against the respondent Company for winding up of the respondent Company under Section 433 (e) read with Section 434 of the Companies Act, 1956. Some of the petitions are pending before this Court since 1996. The petitions are already admitted and duly advertised. All these petitions are placed for hearing for more than 50 times. On behalf of respondent Company, several proposals were given in the past. However, no fruitful result was arrived at. The respondent Company was also declared relief undertaking by the State Government under the Bombay Relief Undertakings (Special) Provisions Act, 1958 and such status remained in existence till 05.11.2004. After November 2004, all the petitioning Creditors are pressing for final hearing of the petitions.

9. On behalf of the respondent Company, learned advocate Mr. R.D. Dave has submitted that the respondent Company has discharged its liabilities towards Statutory Creditors and workers dues. The Company is facing financial crunch and because of that, the dues of the Secured Creditors as well as Unsecured Creditors were not satisfied. The Secured Creditors are co-operating the respondent Company for carrying out its business activities. Further negotiations are going on with the parties who have shown their interest in running the different units of the respondent Company and with their co-operation, the dues of the Secured as well as

Unsecured Creditors will be satisfied. The Court has further observed that on earlier occasion, Mr. Dave has proposed a plan to the Secured Creditors and as per the said plan, 35% of the principle amount shall be paid in four years and six months. First six months shall be the period of moratorium and payment shall be made every six months. This proposal was put forward by the learned advocates appearing for the petitioning creditors before their clients. However, the said proposal was not acceptable to them. It is their common statement that unless and until down payment is made by the respondent Company, no proposal is acceptable to them which comes into operation after six months or so.

10. Considering the above fact situation, the Court was of the view that one more chance should be given to the respondent Company and the Court has accordingly observed that if the respondent Company was in a position to pay atleast 10% of the outstanding dues of each of the Petitioning Creditors or Rs. 1 Lacs, whichever was less, towards the dues of the petitioning Creditors within one month from the date of the said order, the Court would consider that there was bonafide desire on the part of the respondent Company to satisfy the dues of the petitioning Creditors. Accordingly, all these matters were adjourned to 17.03.2005. It was made clear that if the payment as directed above would not be made by the respondent Company to each of the petitioning Creditors within one week from the date of the said order, appropriate orders would be passed on 17.03.2005.

11. On 17.03.2005, learned advocate Mr. R.D. Dave has brought with him in all 20 cheques drawn in favour of each of the petitioning Creditors. The Court has directed the respondent Company to pay atleast 10% of the outstanding dues of each of the petitioning Creditors or Rs. 1 Lac, whichever was less towards the dues of the petitioning Creditors within one week from the date of the order i.e. 10.03.2005. The Court has observed that so far as the small investors are concerned, Mr. Dave has brought the cheques of amount to the tune of 10% of the outstanding dues. However, so far as leasing Companies and Financial Institutions are concerned, Mr. Dave has brought cheques of Rs. 10,000/- each in favour of the Petitioning Creditors. The Court has, therefore, taken the note of the fact that out of 20 Petitioning Creditors, the order passed by this Court on 10.03.2005 was complied with only in respect of 14 petitioners whereas with regard to the remaining petitioners, the order has not been complied with. Even the cheques which were brought on 17.03.2005 by Mr. Dave were also

post-dated cheques. They were all of dated 12.04.2005. Since the respondent Company has shown some dispute to make the payment to the petitioning Creditors towards their outstanding dues, one more opportunity was given to the respondent Company. All these petitions were therefore adjourned to 15.04.2005. It was made clear by the Court on that day that if the cheques whichever were given on that day to each of these 20 petitioners were not realised when they would be presented before the Bank for encashment on their due dates, and if they were bounced for any reason whatsoever, the Court would presume that the respondent Company has failed and/or neglected to pay the outstanding dues of the petitioners. It was made clear that so far as the remaining 6 petitioning Creditors are concerned, the respondent Company was directed to pay the balance amount of Rs.90,000/- to each one of them as per the order passed by this Court on 10.03.2005 on or before 12.04.2005. In any case, on 12.04.2005, all the petitioning Creditors should get 10% of their outstanding dues or Rs. 1 Lacs, whichever was less. If any default is committed by the respondent Company in complying with the said direction, the Court would take adverse view in the matter and pass appropriate order.

12. The Court has also observed in its order dated 17.03.2005 that all the cheques which were brought on that day were handed over to the respective learned advocates appearing for the petitioning Creditors. So far as those matters in which no advocate was appearing, the respondent Company was directed to send cheques directly to the petitioners of their last known address along with the copy of this order. The payment which was given by the respondent Company to the petitioner pursuant to the order of this Court was accepted by the petitioners without prejudice to their rights and contentions in the petition. The statement showing the details of petition No., party, Bank, Principal amount and amount of cheque given was taken on record.

13. Today when all these matters are called out, Mr. P.C. Kavina, learned advocate appearing for petitioner in Company Petition No. 225 of 1997 has submitted that despite the order passed by this Court on 17.03.2005, the respondent Company has not paid the remaining amount of Rs. 90,000/- to the petitioning Creditor and hence, order was not complied with. He has, therefore, requested the Court to pass the winding up order as enough indulgence is shown by this Court over the years since the petition being pending for more than 7 years.

14. Since the order of admission and advertisement was passed in Company Petition Nos. 201 of 1996 and 225 of 1997 and since the Company Petition No. 201 of 1996 has already been dismissed for default on 25.09.2002, Company Petition No. 225 of 1997 is considered as the main matter and facts are taken from the said petition.

15. It is the case of the petitioning Creditor in Company Petition No. 225 of 1997 that on or about March 1996, the respondent Company approached the petitioner for the purpose of seeking financial assistance from the petitioner. The petitioner assessed the performance of the Company and by a written agreement dated 02.05.1996, the petitioner made an inter-corporate deposit for a period of 90 days for an amount of Rs. 25 Lacs with the respondent Company. At the time of execution of the agreement on 02.05.1996, the respondent Company issued post dated cheque No. 512062 dated 29.07.1996 drawn on Bank of India, Malad (W) Branch, in favour of the petitioner. The Director of the Company, namely, Shri Manoj V. Patel executed a letter of Guarantee on 02.05.1996 binding himself over personally for repayment of the above advance. The respondent Company has also executed a Promissory Note on 02.05.1996 promising to pay the petitioner the amount of Rs. 25 Lacs on demand. As per the terms of instrument of Inter Corporate Deposit, the Company was liable to pay the amount of deposit by 31.07.1996. On the petitioner depositing the said post-dated cheque, the same was not honoured by the Bank and was written with remark "Account Closed". The petitioner, therefore, caused to be sent to the Company Notice of Dishonoured cheque under the provisions of the Negotiable Instruments Act, 1881. Since no satisfactory reply was received from the Company nor the amount was repaid, the petitioner had initiated criminal proceedings vide Case No. 1319/MISC of 1996 in 33rd Court of the Metropolitan Magistrate at Ballad Pier, Bombay against the Company and its Directors for offences under Section 138 / 141 of the Negotiable Instruments Act, 1881. The petitioner thereafter sent notice under Section 433 and 434 of the Companies Act, 1956 to the Company which was duly served on the Company. Despite service of notice, the respondent Company has failed and neglected to pay the amount outstanding to the petitioner. On the date of the notice, the outstanding amount due and payable to the petitioner was to the tune of Rs.31,21,227/-. Therefore, the petition was filed for winding up of the respondent Company.

16. The respondent Company has filed its reply on 06.10.1997. A defence was raised on behalf of the

Company that the petitioner has more efficacious and alternative remedy available by way of Civil Suit for recovery of its dues and the jurisdiction of the Company Court cannot be permitted to be converted into an ordinary Civil Court for the purpose of recovery of dues by the petitioner. The Company was a running concern and was paying its all statutory dues to various Govt. authorities, dues of G.E.B. and other local authorities, wages to the employees and the Provident Fund, ESI contribution to the authorities. Hence, there is no question of winding up of the Company.

17. It was further stated that the Company was engaged in the business of manufacturing pharmaceutical products and for that purpose, it was having its factory and Regd. office at Godhra in district Panchmahal. There were about 150 employees working in the Company and they were all regularly paid their salary. The Company has also made the figures of turnovers, profits etc. in the said reply. The Company has also given details about the financial assistance received from other Financial Institutions and on that basis, it was contended that the Company was a financially sound and viable concern and it did not require to be wound up at the instance of the petitioner, merely because the dues of the petitioner were not paid due to stringent financial crisis. The Company has also enumerated certain reasons for the financial crisis and submitted that the Company could pay the principal amount by monthly installments within one year commencing from October, 1997.

18. The respondent Company has filed further affidavit on 02.12.1997 wherein progress made by the Company over the years was indicated. The development programmes undertaken by the Company were also indicated and submitted that the respondent Company has latest technology, plant and machinery, manufacture various pharmaceutical products comprising of tablets, capsules, Syrups, liquids, dry powder and injectables of good and reputed qualities. The respondent Company was facing temporary financial crisis for various reasons. However, the Company was a viable and profit making and running Company which has not lost its substratum. The winding up or even admission of the petition would adversely affect the smooth working of the Company and the result of which would be large number of workers engaged by the Company would be rendered jobless, State Government and Central Government will loose their revenue by way of taxes. The society at large will be deprived of life saving drugs. The foreign revenue earned by the respondent Company by way of export would also be lost to

the country. It was, therefore, urged that no order of winding up would be passed.

19. Even pursuant to the advertisement of petitions, several affidavits were filed to oppose the winding up petition. Few of these objectors are from Air Free Services Godhra, Mahavir Sales Corporation Vadodara, Image Impressions Vadodara, Core Place Packaging Halol etc. Some of the workers and employees of the Company have also filed affidavits opposing the winding up petitions. It was stated in the said affidavits that the respondent Company is one of the best Companies in the backward area of Panchmahals, at Godhra having latest equipments and machineries and has been manufacturing life saving drugs and medicines useful for dangerous diseases. The respondent Company was in a temporary financial crunch and as a result thereof, the respondent Company has not been able to make regular payments to its Creditors. However, the factory is working with almost good capacity and the respondent Company is having good number of years on hand. There are all possibilities of reviving the Company and put it to normal position within the shortest time. Since large number of persons depending upon the Company and considering the geographical situation, the respondent Company which is situated in a backward district of Panchmahals Dist. at Godhra, if the respondent Company is ordered to be wound up, the tribals and large number of workers will be rendered unemployed. Not only that but the ancillary units / business people depending upon the respondent Company will also be ruined. If the respondent Company is allowed to continue its business than, it is quite possible that soon the respondent Company will be able to start repayment of dues to the Secured and Unsecured Creditors. It was also contended that it is not at all advisable and desirable to pass any order of winding up against the respondent Company because the respondent Company has made profits all throughout and only in last about 2 to 3 years, the respondent Company has been facing financial crisis and liquidating crunch. The Secured Creditors like Banks and Financial Institutions who have given large amount of finance to respondent Company have been trying to put the respondent Company into normal condition by granting certain facilities and by not taking coercive step for recovery of their dues. The said institutions have found that the respondent Company is a viable Company which can be put to its position by recommending the respondent Company in the haul of financial crunch which is prevalent in the entire Asian region. Lastly, it was contended that majority class of Creditors, including workers who are Secured

Creditors are not interested in winding up of the respondent Company and, therefore, the respondent Company may not be ordered to be wound up at the instance of few Unsecured Creditors who have filed the petitions with ulterior object of recovering their dues.

20. Almost all the affidavits are on the same line and are also filed during the same period i.e. in June, 1998. Considering these affidavits and believing that the respondent Company was facing merely a temporary financial crunch, the Court has not passed the winding up order on earlier occasion. Seven years have passed since then. The Company has given several proposals, many promises and assurances were given for repayment of the dues. In between the Company was considered as GBIFR Company. The Company was declared relief undertaking by the State Government. Over the years, several opportunities were granted by all concerned parties to the Company so as to see that it may be revived. As on today, the position is that the Company has come to a grinding halt. No business activities are going on. The production is completely stopped. The workers have either left or they have been discharged. The Management is only trying to sell the plant and machinery and other business assets of the Company. There is no intention on the part of the Management to run the unit. Uptill now, the time is sought for only with a view to see that somebody may take over the business affairs and management of the Company and discharge the liability of the Company. However, nothing is materialised till this date. The position which emerges now is that the Company's financial substratum has totally lost. The Company is not in a position to discharge its liabilities either towards its Secured or Unsecured Creditors. This has been obviously proved by the fact that the Company was not in a position to pay even an amount of Rs.90,000/- to these Creditors pursuant to the direction issued by this Court especially when it was made very clear that if this amount has not been paid or the order is not complied with, the Court would be constrained to pass adverse order against the Company.

21. In the above view of the matter, the Court does not see any justification to allow the Company or its Management to fritter away the assets in the manner they like. The position which was presented before the Court in 1998 is not at all in existence today and hence, it does not convince the Court not to pass the winding up order. The learned advocates appearing for the Petitioning Creditors which are more than 20 in numbers have strongly urged that if any further indulgence is

shown by the Court by way of granting time, it would only lead to their detriments and in that situation, they won't be in a position to recover a single paisa from the respondent Company. All the ingredients which are necessary for the purpose of passing the winding up order are in existence and hence, simply on the basis of past record which may be glorious according to the Company, would not help the Company any further.

22. Keeping broad parameters in mind, the Court is of the view that it is just and proper to pass the order of winding up as it is in the larger public interest as well as in the interest of the Creditors and all other concerned parties and hence, the Court hereby passes the winding up order. Accordingly, the Official Liquidator attached to this Court is hereby appointed as the Liquidator of the Company. He is directed to take charge and possession of the assets of the respondent Company. However, before taking such possession, he is directed to issue notices to the Managing and/or Executive Director of the Company, if any and to the Secured Creditors. Before appointing security agency and/or valuer for the purpose of taking out inventory, the O.L. is directed to take prior permission of this Court. The Official Liquidator is also directed to undertake simultaneously exercise of inviting claims from the Workers as well as the Creditors, immediately after taking possession of the assets of the Company and also immediately send notices to the Directors of the Company to file statement of affairs within the statutory time limit.

23. With the aforesaid directions and observations, Company Petition No. 225 of 1997 is disposed off wherein winding up order is passed and in view of the said winding up order, all other petitions are also accordingly disposed off. Case papers of Company Petition Nos. 409 of 1997, 387 of 1997 and 341 of 1997 are not traceable. These petitions are also for winding up of the respondent Company and since the winding up order is passed in Company Petition No. 225 of 1997, they do not survive now and they are also treated as disposed off. Since the Company Petitions are disposed of, Company Application No. 525 of 1997 moved by the petitioning Creditor of Company Petition No. 387 of 1997 does not survive and it is accordingly disposed of.

[K.A. PUJ, J.]

#Savariya#

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